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Attorney for Plaintiff, C.S

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

C.S., by and through his Conservator,	)	CASE NO.: 08 CV 0226 W (AJB)
MARY STRUBLE, on behalf of himself	)	PLAINTIFF'S EX PARTE
and all others similarly situated,	)	APPLICATION FOR LEAVE TO FILE
	)	SUR-REPLY IN SUPPORT OF
	)	PLAINTIFF'S OPPOSITION TO
Plaintiff,	)	OAH'S MOTION FOR
	)	INTERVENTION
v.	)	
	)	Date: April 7, 2008
	)	Judge: Hon. Thomas J. Whelan
CALIFORNIA DEPARTMENT OF	)	
EDUCATION, a State Agency,	)	
Defendant.	)	

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that, Plaintiff, C.S. ("Plaintiff"), through his  
3 attorney of record, hereby applies *ex parte* for the Court to permit Plaintiff to file a  
4 Sur-Reply in Opposition to OAH's Motion For Intervention. The basis for this  
5 application is that Plaintiff did not have the benefit of Defendant, California  
6 Department of Education's ("CDE") Answer to the Complaint at the time  
7 Plaintiff's Opposition to Motion For Intervention was due.

#### 8 INTRODUCTION

9 CDE was aware that its Answer was due on March 17, 2008. CDE was also  
10 aware that in accordance with the Court's Order Extending Briefing Schedule,  
11 Plaintiff's Opposition to OAH's Motion For Intervention was due on March 24,  
12 2008. CDE granted itself an extension of time to Answer in violation of Local  
13 Rule 12.1, and filed its Answer on March 25, 2008. Therefore, at the time Plaintiff  
14 filed its Opposition to OAH's Motion For Intervention, Plaintiff was unaware of  
15 the position of CDE with regard to the various allegations in the Complaint  
16 concerning the lack of expertise, training and compliance with IDEA of OAH's  
17 ALJ's. Plaintiff seeks to re-cast its Opposition in a Sur-Reply in order to highlight  
18 the obvious alignment of interest and defenses between OAH and CDE, as well as  
19 to correct some inaccuracies in OAH's Reply.

#### 20 ARGUMENT

##### 21 1. THERE IS GOOD CAUSE TO GRANT THIS EX PARTE APPLICATION

22 Ex parte relief is justified where a party can show that "[its] cause will be  
23 irreparably prejudiced if the underlying motion is heard according to regular  
24 noticed motion procedures" and "that the moving party is without fault in creating  
25 the crisis...or that the crisis occurred as a result of excusable neglect." *Mission*  
26 *Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 493 (C.D. Cal. 1995).

27 A. Plaintiff Will Be Irreparably Prejudiced If Not Able To Correct  
28 OAH's Mischaracterizations Regarding Its Relationship With CDE.

1 Plaintiff was not at fault in the late filing of CDE's Answer, and would be  
2 prejudiced if Plaintiff is not permitted to address OAH's Reply to Opposition To  
3 Motion For Intervention, which was prepared and filed after the filing of CDE's  
4 Answer, yet still characterizes CDE's Answer to the Complaint as "having no  
5 bearing on OAH's intervention." (Reply, p. 3, lines 22-23 and footnote 2).

6 Moreover, OAH continues to allege that CDE did not want to contract with  
7 OAH in 2005 (Reply, pp. 3-4, lines 26-1). However, in its Answer in paragraphs  
8 105 and 106, CDE expressly denies that it did not want to contract with OAH in  
9 2005. Additionally, CDE's recent e-mails and statements clearly show that, "as  
10 things stand right now, there's no way on God's green earth that we are not going  
11 to contract with them [OAH] on July 1, 2008." (Exhibits A and B to Plaintiff's  
12 Opposition to Motion For Intervention).

13 OAH in its Reply failed to consider CDE's Answer, which clearly reflects  
14 CDE's united interest with OAH. Plaintiff should be allowed to file a Sur-Reply.

15 B. Plaintiff is Without Fault In Creating this Situation.

16 Plaintiff did nothing to contribute to the late filing of CDE's Answer. In  
17 fact, but for Plaintiff's prompting, CDE may have taken even longer to file its  
18 Answer. CDE's Answer joins issue and presents its theories of the case. As such,  
19 it is relevant to whether OAH should be allowed to intervene in the action at this  
20 time. In order for the Court to decide whether intervention is necessary, it must  
21 review the status of the case as it then stands, and the Court must look at all  
22 relevant circumstances in the particular case. *United States v. Yonkers Board of*  
23 *Education*, 801 F. 2d 593, 595 (2d Cir. 1986).

24 As seen in the accompanying Declaration of Ellen Dowd, Esq. in Support of  
25 Ex Parte Application For Leave To File Sur-Reply, CDE's responses and defenses  
26 clearly show its adequacy to represent OAH's interests in this action.

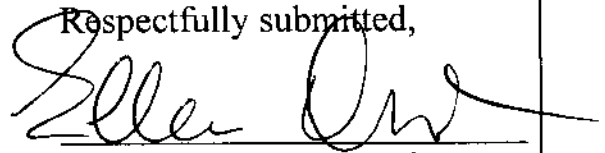
27 CONCLUSION

28 Based upon the foregoing, Plaintiff respectfully request leave to file a Sur-

1 Reply forthwith.

2 Dated: April 1, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ellen Dowd", is written over a horizontal line.

Ellen Dowd, Attorney for  
Plaintiff, C.S.